BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

HILDA RIVERA	)	
Claimant	)	
VS.	)	
	)	
BEEF PRODUCTS, INC.	)	Docket No. 1,062,361
Respondent	)	
AND	)	
	)	
ZURICH AMERICAN INSURANCE CO.[1]	)	
Insurance Carrier	)	

ORDER

Respondent requests review of Administrative Law Judge Pamela J. Fuller's April 9, 2013 preliminary hearing Order. Scott J. Mann of Hutchinson, Kansas, appeared for claimant. William L. Townsley of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

Judge Fuller found claimant gave notice of her left thumb injury in July 2010, and Dr. Do found her work activities with respondent aggravated, accelerated or intensified her thumb condition. Judge Fuller ruled claimant's injury arose out of and in the course of her employment and ordered that respondent provide medical treatment to her left thumb.

The record on appeal is the same as that considered by Judge Fuller and consists of the April 8, 2013 preliminary hearing transcript and exhibits thereto, the transcript of the March 20, 2013 deposition of Pat Do, M.D., and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUES

Respondent requests that the Board reverse Judge Fuller's Order and find that claimant's left thumb condition is unrelated to her work for respondent, but is rather preexisting and personal. Respondent asserts that claimant's thumb condition, if it were aggravated by her work, would have continued to be aggravated until respondent shut down on March 25, 2012. Respondent also argues claimant's alleged repetitive trauma was not the prevailing factor in causing her injury, medical condition and resulting disability.

[1] Email notices from the Division of Workers Compensation reference "Liberty Insurance Corporation." Judge Fuller's order references "Zurich American Insurance Co."

Claimant did not submit a brief. Based on her attorney's statements at the preliminary hearing, she asserts that she sustained a compensable aggravation, acceleration or intensification of her preexisting thumb condition. Claimant alleges that her date of accident was in July 2010, when she gave notice to respondent that she had injured her bilateral upper extremities, including her hands.

The issues include:

(1) What is claimant's date of accident or date of injury by repetitive trauma?

(2) Did claimant prove a compensable personal injury by accident or repetitive trauma that arose out of and in the course of her employment?

FINDINGS OF FACT

Claimant began working for respondent in mid-1988. She started in meat processing and later scanned boxes for eight to twelve hours a day, pushing a button on the scanner using her thumb. When she started having problems with one thumb, she would switch to using the other thumb.

Claimant has a long history of bilateral hand complaints. On March 27, 2001, Gary M. Kramer, M.D., diagnosed claimant with basilar arthritis and prescribed Vioxx.

Claimant was seen by Michael J. Baughman, M.D., on July 23, 2009, for bilateral hand pain and deformity. Dr. Baughman noted her symptoms had been present for years and were insidious and progressive. Dr. Baughman indicated claimant had been evaluated five years prior and found to have rheumatoid arthritis markers correlating with her complaints. Dr. Baughman advised claimant to see a rheumatologist, but she never did. He diagnosed claimant with rheumatoid arthritis, bilateral CMCJ osteoarthritis with deformity and bilateral carpal tunnel syndrome. Dr. Baughman recommended a CMCJ arthrodesis and carpal tunnel release on the right hand.

At an unknown time in 2010, claimant advised respondent that she was alleging repetitive trauma to her upper extremities each and every working day through July 21, 2010.[2] Respondent referred claimant to Terry R. Hunsberger, D.O., who examined her on July 22, 2010, for thumb, hand and wrist pain. Dr. Hunsberger listed an accident date of July 21, 2010. Dr. Hunsberger indicated claimant had some deformity in the proximal thumbs and hands, including Heberden's nodes. He recommended claimant see a rheumatologist and noted, "I do not feel that this is work related. This should be [on the] personal side."[3]

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[2] Resp. Brief at 3.

[3] P.H. Trans., Resp. Ex. 1 at 3; Do Depo., Ex. 3 at 11.

At a July 28, 2010 follow-up with Dr. Hunsburger, x-rays of the left hand showed osteoarthritis of the left thumb. Claimant was diagnosed with bilateral hand and wrist arthritis. Dr. Hunsberger recommended nerve conduction studies. On August 31, 2010, Dr. Hunsberger noted the nerve conduction studies showed moderate carpal tunnel syndrome on the right. Claimant was referred to James A. Britton, M.D., an orthopedic surgeon.

Claimant was evaluated by Dr. Britton on September 28, 2010 for bilateral wrist pain. Dr. Britton noted claimant complained of right wrist pain for "eleven years' duration", with aching of the right thumb CMC joint, no strength, no grip. Dr. Britton indicated claimant had "slight aching over the left wrist and CMC." Dr. Britton recommended a carpal tunnel release on the right, as well as fusion or interposition of the right CMC joint.

On November 15, 2010, claimant underwent right carpal tunnel release, paid under workers compensation insurance, and right thumb CMC joint fusion, paid by her private health insurance. Claimant was given light duty restrictions for her right hand.

Dr. Britton, on February 25, 2011, referred claimant to St. Catherine Hospital for hand therapy. The physical therapy record entitled "Audit Report of Hospital Stay" dated March 14, 2011 noted, "the left hand is starting to hurt worse than the right side." Claimant was released to full duty by Dr. Britton on March 19, 2011 for her right hand and wrist. He assigned claimant a 1% permanent partial impairment to the right upper extremity.

Respondent shut down production in its plant on March 25, 2012, which was the last date claimant worked for respondent. Subsequently, claimant has not worked.

On July 10, 2012, claimant was seen at her attorney's request by C. Reiff Brown, M.D., who found she had degenerative arthrosis of the left carpal metacarpal joint and recommended she be seen by an orthopedist. Dr. Brown stated:

> In my opinion, the employment that she was doing exposed her to an increased risk which would not have been present in normal non-employment life. The increased risk or hazard to which she was exposed is the prevailing factor in causing this repetitive trauma injury. The repetitive trauma is the prevailing factor in causing the medical condition, resulting need for additional treatment, and the impairment.[4]

Claimant filed an application for hearing with the Director's office on September 18, 2012, alleging injury to her "Bilateral Upper Extremities BTCS and BCMC – thumb joints"[5] from each and every working day through July 21, 2010.

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[4] *Id.*, Ex. 3 at 8.

[5] "BTCS" was perhaps meant to be "BCTS" and likely refers to bilateral carpal tunnel syndrome.

On September 19, 2012, claimant was seen for a court-ordered independent medical examination by Pat Do, M.D., under a separate claim, Docket No. 1,061,270. Dr. Do noted claimant had left thumb pain for two to three years. His examination of claimant's left thumb revealed a left carpometacarpal joint subluxation and bone spurs upon palpation. He diagnosed her with left thumb carpometacarpal joint arthritis. Dr. Do recommended left thumb surgery under her own health insurance. Dr. Do stated:

> Within a reasonable degree of medical probability, the left basilar joint arthritis, I agree with Dr. Britton, like her right thumb, her left thumb is not related to her work, and certainly not the prevailing factor for her left thumb arthritis. Certainly work can cause some temporary aggravations and can cause some contribution to the left thumb but certainly it does not meet the prevailing factor requirements for the left thumb.[6]

On March 20, 2013, Dr. Do testified that claimant's left thumb condition was due to arthritis and systemic personal issues and not related to her work activities. Dr. Do also testified that claimant's repetitive work aggravated, accelerated or intensified her thumb condition.[7]

PRINCIPLES OF LAW

According to K.S.A. 44-505(c), the rights of the parties in a Kansas workers compensation claim are governed by the law in effect on the date of accident.

Old Law (Pre-May 15, 2011)

K.S.A. 2010 Supp. 44-501(a) states in part: "the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as: "the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[8] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[9]

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[6] Do Depo., Ex. 2 at 3.

[7] Do Depo. at 8, 13, 15.

[8] K.S.A. 2010 Supp. 44-501(a).

[9] *Kindel v. Ferco Rental, Inc*., 258 Kan. 272, 899 P.2d 1058 (1995).

The two phrases arising "out of" and "in the course of" employment have separate and distinct meanings:

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[10]

K.S.A. 2010 Supp. 44-508(d) states:

> 'Accident' means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

K.S.A. 2010 Supp. 44-508(d) states:

> 'Personal injury' and 'injury' mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. And injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

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[10] *Id.* at 278.

The Kansas Supreme Court has held that when a worker with a preexisting condition sustains a subsequent work-related injury that aggravates, accelerates, or intensifies his or her condition, he or she is entitled to be fully compensated for the resulting disability.[11] The test is not whether the injury causes the condition, but whether the injury aggravates or accelerates the condition.[12]

On appeal from a preliminary hearing, the Board may review only allegations that an administrative law judge exceeded his or her jurisdiction,[13] including: (1) whether the worker sustained an accidental injury; (2) whether the injury arose out of and in the course of employment; (3) whether the worker provided timely notice and timely written claim; and (4) whether certain other defenses apply. "Certain defenses" are defenses going to the compensability of the injury.[14]

New Law (May 15, 2011 Forward)

K.S.A. 2011 Supp. 44-501b(c) states, "The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record."

K.S.A. 2011 Supp. 44-508 states in part:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
>
> (e) "Repetitive trauma" refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. "Repetitive trauma" shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.

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[11] See *Baxter v. L. T. Walls Constr. Co.*, 241 Kan. 588, 591, 738 P.2d 445 (1987).

[12] See *Claphan v. Great Bend Manor*, 5 Kan. App.2d 47, 49, 611 P.2d 180, *rev. denied* 228 Kan. 806 (1980).

[13] K.S.A. 2010 Supp. 44-551.

[14] See *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 674, 994 P.2d 641 (1999).

In the case of injury by repetitive trauma, the date of injury shall be the earliest of:

(1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;

(2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;

(3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

(A) An injury by repetitive trauma shall be deemed to arise out of employment only if:

(i) The employment exposed the worker to an increased risk or hazard which the worker would not have been exposed in normal non-employment life;

(ii) the increased risk or hazard to which the employment exposed the worker is the prevailing factor in causing the repetitive trauma; and

(iii) the repetitive trauma is the prevailing factor in causing both the medical condition and resulting disability or impairment.

. . . .

(3)(A) The words “arising out of and in the course of employment” as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

(h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

ANALYSIS

(1) The Board Has Jurisdiction to Review Judge Fuller's Determination Regarding Date of Accident.

As observed in respondent's brief, "The proper determination of the date of accident for claimant's purported left thumb injury is critical in this case, because it determines which version of the Workers Compensation Act applies to the claimed injury."[15]

The Board generally lacks jurisdiction to review a judge's determination of the date of accident on appeal from a preliminary hearing order, unless the outcome of another compensability issue depends on such a finding.[16] Whether a judge was correct in awarding or not awarding medical treatment following a preliminary hearing is not an appealable issue under the old or new versions of K.S.A. 44-534a. However, respondent is not confining its argument to date of accident or that medical treatment was unwarranted. Respondent argues claimant did not suffer an accident, repetitive trauma or injury that arose out of and in the course of employment. Respondent argues that the date of accident, under the new law, should be March 25, 2012, her last day worked.

Under the old law, claimant only need to prove a work-related aggravation, acceleration or intensification of a preexisting condition for compensability. Under the new law, claimant must prove that her repetitive trauma was the "prevailing factor" in causing her injury, medical condition and resulting disability or impairment. Under the new law, an injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

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[15] Respondent's Brief at 8.

[16] See *Wilson v. Liquid Environmental Solutions*, Nos. 1,056,730, 1,056,731, 2012 WL 3279501 (Kan. WCAB July 6, 2012), and *Milham v. Boeing Co.*, No. 1,001,547, 2002 WL 31103945 (Kan. WCAB Aug. 19, 2002).

If the old law applies, claimant is entitled to medical treatment for her left thumb based on Dr. Do's testimony regarding aggravation, acceleration or intensification of a preexisting condition. If the new law applies, treatment for claimant's left thumb is not appropriate based on Dr. Do's prevailing factor opinion. Insofar as the correct date of accident or injury by repetitive trauma determines which version of the law applies, the Board has jurisdiction on appeal from a preliminary hearing to review the judge's determination of the date of accident or repetitive trauma.[17]

The issue in this case concerns whether claimant's repetitive trauma was the prevailing factor in her medical condition, or at least her current need for medical treatment. By statute, the prevailing factor issue is part of the "arising out of" issue. This Board Member concludes that respondent's arguments concerning prevailing factor present an appealable issue from a preliminary hearing order.

Judge Fuller impliedly found that pre-May 15, 2011 law applied to this case. A fair reading of the preliminary hearing transcript indicates that Judge Fuller found a July 2010 date of accident based on when respondent had "notice" of the claim.[18] Respondent admitted receiving notice on or about July 21, 2010. K.S.A. 2010 Supp. 44-508(d) contains many triggering events that help determine the date of accident for a series of repetitive injuries, one of which is when the employee gives written notice of the injury to the employer. Respondent knew in writing, in July 2010, that claimant was asserting bilateral thumb, hand and wrist injuries, as documented in Dr. Hunsberger's July 22, 2010 report. The written notice of injury, while generated by Dr. Hunsberger, was in direct response to claimant complaining that her work was causing her bilateral upper extremity injuries, including to her thumbs. Such written documentation of injury was the first triggering event to affix a date of accident by a series of events, repetitive use, cumulative traumas or microtraumas. Based on the current record, claimant's date of accident is July 22, 2010.

While respondent has legitimate arguments regarding date of injury by repetitive trauma, which law applies, and whether claimant's work subsequent to July 2010 resulted in an aggravation, Judge Fuller properly determined the date of accident. This Board Member notes that both the new law and the old law concerning repetitive injuries, in general, emphasize assigning a date of accident or repetitive injury based on the *earliest* of various triggering events.[19] Moreover, while claimant's subsequent work may have resulted in a worsening, the date of injury by repetitive trauma is a legal fiction.[20]

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[17] See generally *Harrington v. Tetra Management, Inc.*, No. 1,057,151, 2012 WL 5461468 (Kan. WCAB Oct. 8, 2012), and *Nay v. Petco*, No. 1,056,075, 2012 WL 4040466 (Kan. WCAB Aug. 28, 2012).

[18] See P.H. Trans. at 14, 22, 24-25.

[19] K.S.A. 2010 Supp. 44-508(d) and K.S.A. 2011 Supp. 44-508(e).

[20] *Curry v. Durham D & M, LLC*, No. 1,051,135, 2011 WL 1747854 (Kan. WCAB Apr. 27, 2011).

(2) Claimant Proved Personal Injury by Accident that Arose Out of and in the Course of Her Employment.

The court-ordered physician, Dr. Do, opined that claimant's repetitive work aggravated, accelerated or intensified her preexisting bilateral thumb condition. Under the pre-May 15, 2011 law, claimant's aggravation is compensable.

CONCLUSION

Claimant sustained personal injury by accident to her left thumb by a series of events, repetitive use, cumulative traumas or microtraumas which arose out of and in the course of her employment with respondent, as based on Dr. Do's opinion regarding an aggravation, acceleration or intensification of a preexisting condition. Claimant's legal date of accident is July 22, 2010.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[21] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

DECISION

WHEREFORE, the undersigned Board Member affirms Judge Fuller's April 9, 2013 preliminary hearing Order.

IT IS SO ORDERED.

Dated this _____ day of June, 2013.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

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[21] K.S.A. 44-534a.